United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6139

To be argued by
PROSPER K. PARKERTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6139

JAMES F. REGAN,
Plaintiff-Appellant,

—*against*—

JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND, FRANCIS R. JULES, and DONALD J. GRATTAN,
Defendants-Appellees,

—*and*—

JOHN CALLAGHAN, individually and as a member of The New York City Police Department, JAMES M. HARKINS, individually and as a member of The New York City Police Department and HOWARD GREENWALD, individually and as a member of The New York City Police Department,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND ADDENDUM FOR DEFENDANTS-APPELLEES

DAVID G. TRAGER,
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Of Counsel.

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal by James F. Regan from an order of the United States District Court for the Eastern District of New York (Neaher, J.) entered August 2, 1976, in an action seeking money damages for the alleged violation of appellant's civil and constitutional rights and for pendant tort claims under state law. The claim

against the four federal agents who were named defendants arose from the plaintiff's arrest and detention on November 15, 1973 and November 16, 1973 ~~and November 16, 1973~~ and the action was commenced on January 27, 1975. Judge Neaher's order granted judgment on the pleadings in favor of the federal defendants on the ground that the action was time barred as to them under New York State's one year statute of limitations in N.Y.C.P.L.R. § 215 and directed entry of a final judgment as to them in accordance with Fed.R.Civ.P. 54(b).

On this appeal the federal appellees' position is that (1) the applicable period of limitations in a *Bivens*[1] action for money damages brought in New York is that which New York would enforce had an action seeking similar relief been brought in a court of that state, (2) the applicable New York State provision is the one year statute of limitations contained in N.Y.C.P.L.R. § 215(1) or, in the alternative, the one year statute of limitations contained in N.Y.C.P.L.R. § 215(3), the complaint fails to allege the requisite discriminatory animus for a claim under Title 42 U.S.C. § 1985 and (4) the complaint fails to state a pendant claim for defamation or invasion of privacy. Accordingly, the order and judgment appealed from herein should be affirmed.

Statement of Facts

For the purposes of a motion for judgment on the pleadings the well pleaded material allegations of the complaint are taken as true. *Gardner* v. *Toilet Goods Ass'n.*, 387 U.S. 167 (1967); *See* 2A J. Moore ¶ 12.15,

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[1] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

at 2342 (2d ed. 1975). While the federal appellees do not admit or acquiesce in the allegations of the complaint for any other purpose, because they are taken as true for purpose of the motion for judgment on the pleadings the allegations of the complaint will not be disputed in this statement of facts.

The material facts on this appeal are the allegations of the complaint, which can be succinctly summarizzed. The federal defendants Joseph F. Sullivan, George Van Nostrand and Francis R. Jules were at all materia' times Special Agents of the Federal Bureau of Investigation and the defendant Donald Gratin was at all material times a Customs Agent of the United States Customs Service [hereinafter the federal appellees; the remaining defendants will be referred to as the city defendants] (App. 7-8). The actions of the federal appellees were taken under color of federal law. (App. 9). The federal and city defendants seized the plaintiff on November 15, 1973, at J.F.K. International Airport, searched his automobile and locker without a warrant or probable cause. They then took him to the F.B.I. office at the airport, to an unknown police station, to the West Street Federal House of Detention in New York, New York and then to the United States Courthouse in Brooklyn, New York. (App. 7). Before being given the *Miranda* [2] warnings, he was searched by the federal appellees and after being given certain warnings he was questioned, photographed and fingerprinted in the absence of counsel. (App. 8). He further alleged that a complaint was filed against him on November 16, 1973, charging him with participating in an armed robbery in which merchandise moving in foreign commerce having a value of more than $100.00 was stolen (Title 18 U.S.C. § 659), that he was arraigned before a magistrate and held in custody until a bail of $25,000.00 was raised and posted, and that the complaint was dismissed on November 27, 1973. (App. 8-9).

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

On November 17, 1973, two newspaper articles describing his arrest were published and on various subsequent dates photographs of him were caused by the defendants to be shown to various persons. (App. 8-9). On January 29, 1976, the appellant commenced this action for compensatory and punitive damages pursuant to Title 28 U.S.C. §§ 1331 and 1343 (Appellant's brief 5). The complaint was brought against the federal appellees and city defendants,[3] alleging violations of the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. §§ 1983 and 1985, and also alleging pendant claims for slander, defamation of character, invasion of privacy, false arrest, abuse of process and malicious prosecution. (App. 9-10).

ARGUMENT

POINT I

The District Court Properly Held That In The Absence Of A Federal Statute Of Limitations The Court Should Borrow The State Statute Of Limitations Applicable To The Most Similar State Cause of Action.

In *Bivens* v. *Six Unknown Named Agents Of The Federal Bureau Of Narcotics*, 403 U.S. 388 (1971), as an exercise of federal judicial power, the Supreme Court created a remedy of damages for violation of Fourth Amendment rights (*See* concurring opinion of Harlan, *J.*) and:

> establish[ed] for the first time since the founding of the Republic the federal common law right of an

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[3] Also named in the complaint were other defendants against whom the action was dismissed prior to the order which is the subject of this appeal (App. 41).

> aggrieved person to sue for damages caused by a violation of the Fourth Amendment guarantee against unreasonable searches and seizures. *Bivens* v. *Six Unknown Named Agents Of The Federal Bureau Of Narcotics, on remand,* 456 F.2d at 1339 (2d Cir. 1972).

However, neither the Supreme Court nor Congress has provided a federal statute of limitations for a *Bivens* action.

Where there is no federal statute of limitations for a federally created claim for money damages it is well settled that the federal courts will borrow the statute of limitations applicable to the most similar state cause of action. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) (Labor Management Relations Act); *Campbell* v. *Haverhill*, 155 U.S. 610 (1895) (Patent Act). *See Cope* v. *Anderson*, 331 U.S. 461 (1947) (National Bank Act—application of state statute of limitations to federal action for equitable relief). The Supreme Court has held that, in the absence of a federal statute of limitations, the controlling period of limitations for a claim for money damages under civil rights statutes is the most appropriate one provided by state law. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (applying Tennessee one year statute of limitations for intentional torts and federal civil rights actions to a claim under 42 U.S.C. § 1981); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (applying Louisiana one year statute of limitations for an action for damages resulting from offenses to a claim under the predecessors to 42 U.S.C. §§ 1981-1994). In statutory civil rights actions the Second Circuit has consistently applied the state statute applicable to the most similar state cause of action. *Kaiser* v. *Cahn*, 510 F.2d 282 (2d Cir. 1974); *Swan* v. *Board of Education of the City of New York*, 319 F.2d 56 (2d Cir. 1963). Recently, in

Fine v. *The City of New York*, 529 F.2d 70 (2d Cir. 1975), this Court confronted the application of the appropriate statute of limitations for a claim for damages against the City of New York which was not founded upon a civil rights statute, but which was premised upon a violation of the Fourteenth Amendment to the United States Constitution. For the assistance of the District Court on remand, the Court found warranted a similar approach to that of applying the most appropriate statute of limitations provided by state law in actions under 42 U.S.C. § 1981 and expressed the belief that "the one year and ninety day period of limitations provided by New York's General Municipal Law § 50-i, governing tort claims against municipalities, would appear to be the most appropriate one provided by state law." *Id.*, at 76 [footnote omitted]. Following this approach, the District Court in *Lombard* v. *Board of Education of the City of New York*, 407 F. Supp. 1166 (E.D.N.Y. 1976), opined that a claim for money damages under the *Bivens* rationale, as opposed to a claim for equitable relief, against the Board of Education would be barred by the statute of limitations provision of the N.Y. Gen. Mun. Law § 50-i of one year and ninety days.

The well settled principle of applying the statute of limitations applicable to the most similar cause of action has been deviated from only in rare and unusual circumstances which are not present here. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) held that a legal statute of limitations found to apply to plaintiff's situation in a case decided during the pendency of the suit would not be applied retroactively to bar plaintiff's suit. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) held that in a suit in equity the court need not directly apply a state statute of limitations for an action at law but, in determining laches, it might toll the statute of limitations until the

injured plaintiff discovered the fraud. In a third case, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) the Supreme Court held that since an injured seaman would have to sue for unseaworthiness and Jones Act negligence in the same proceeding a state might not apply a shorter statute of limitations to the unseaworthiness claim than Congress had provided for the Jones Act claim.

In the present circumstances, as with a statutory claim for a violation of civil rights, the state statute of limitations for the most similar state cause of action should be applied. In regard to a statutory claim for a violation of civil rights the Supreme Court stated, "Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson* v. *Railway Express Agency, supra,* at 464.

Nevertheless, appellant contends that the court should fashion a special federal limitations period for *Bivens* actions, relying primarily on the concurring opinion of Mr. Justice Brennan in *McAllister, supra.* However, the support appellant seeks to obtain from Mr. Justice Brennan's opinion disregards the fact that in *McAllister* Congress had provided a specific statute of limitations for a Jones Act claim while Congress has permitted the statutes of limitations of the various states to govern the timeliness of statutory claims for violations of civil rights.[4] The logical and necessary corollary of permitting the statutes of limitations of the various states to govern is to observe the distinctions which the state statutes provide for different causes of action against different defendants. *See Fine* v. *City of New York, supra.*

[4] Although a bill providing a one year statute of limitations for actions under 42 U.S.C. § 1983 was introduced in the House of Representatives and referred to the Committee on the Judiciary during the last session of Congress, it was not voted on before the close of the session. H.R. 12874, 94th Cong., 2d Sess. (1976).

In contending that the court should fashion a special federal limitations period for *Bivens* actions, appellant first proposes that the period created be the same as that applied in a claim under 42 U.S.C. § 1983. Appellant recognizes that the creation of such a federal period of limitations would not create national uniformity in the treatment of *Bivens* actions and would not provide uniformity between the treatment of *Bivens* actions and analogous state causes of action. It would only create uniformity in the treatment of *Bivens* actions and actions under 42 U.S.C. § 1983 which arise in the same state. The few cases cited by appellant in support of his proposal [5] represent a repudiation of the policy of promoting uniformity of treatment between federal claims and analogous state causes of action. The facile switch from applying the state statute of limitations for the most similar *state* cause of action to applying the state statute of limitations for the most similar *federal* claim, where Congress has not created a federal statute of limitations but has permitted the statutes of limitations of the various states to govern, would be an unjustified departure from this well settled principle.

Next, appellant propses that the special federal limitations period for a *Bivens* action should be two years because 28 U.S.C. § 2401(b) prescribes a two year statute of limitations for Federal Tort Claims and in 28 U.S.C. § 2680(h) the United States has waived sovereign immunity for tort claims for certain acts of federal investigative or law enforcement officers occurring on or after March 16, 1974, which acts might also form the basis for *Bivens* claims. The analogy between the two claims is too strained to support the judicial creation of a federal

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[5] Appellant's statement of the holding *Lombard* v. *Board of Education of the City of New York, supra,* is in error.

two year statute of limitations for *Bivens* actions. A *Bivens* action is against individuals for a violation of constitutional rights, while a Federal Tort Claims arising from the same conduct would be against the United States for a liability under state tort law for acts committed on or after March 16, 1974. In addition, 28 U.S.C. § 2401(b) pertains to the filing of an administrative claim with the appropriate federal agency and not the commencement of a law suit.

Accordingly, the court below correctly held that the statute of limitations applicable to the claims against the federal officers was the state statute applicable to the most similar state cause of action.

POINT II

The District Court Correctly Held That Appellant's *Bivens* claims against the Federal Defendants Were Barred by the New York One Year Statute of Limitations Contained in N.Y.C.P.L.R. §215(1).

The District Court dismissed appellant's Bivens claims against the federal defendants as barred by the statute of limitations in N.Y.C.PL.R. §215(1) which provides:

> The following actions shall be commenced within one year:
>
> 1. an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except non-payment of money collected upon an execution; (McKinney's 1972).

Within the schema of New York statutes of limitations this section is the most applicable statute for a common law *Bivens* action against federal agents because their duties and liability are very close to those of a sheriff in New York State.

A sheriff, under-sheriff, and deputy sheriff in New York is a peace officer or a police officer, N.Y. Cr. Pro. Law §§33 and 34, and has broad duties as a conservator of the peace, N.Y. County Law §650. See *Pearce* v. *Stephens*, 18 App. Div. 101, 104-5, 45 N.Y.S. 422, 424-5. (2nd Dept.) *aff'd* 153 N.Y. 673. (1897). However, unlike other police officers, §13(2) of the New York State Constitution provides that the county shall never be made responsible for the acts of the sheriff. Thus, a particular statute of limitations has been provided for sheriffs as distinguished from other police officers whose liability for common law claims is governed by the one year and ninety day statute of limitations embodied in N.Y. Gen. Mun. Law § 50-1. *See Hahin* v. *City of Buffalo*, 41 Misc. 2d 218, 246 N.Y.S. 2d 917 (Sup. Ct. 1964). *Cf. Fine* v. *City of New York*, 529 F.2d 70, 76 (2d Cir. 1975).

Similarly, there is no municipal liability for the acts of federal officers committeed in the performance of their duties and at the time of the acts complained of in the complaint there was no federal liability for such acts. Nor is there any provision for indemnification of federal officers for such acts similar to the indemnification provisions for police officers in N.Y. Gen. Mun. Law §§50-j and 50-k.

The duties of customs officers are broadly stated in 19 U.S.C. §1401 and their powers, including the broad powers to conduct "border searches" are expressed in 26 U.S.C. §7697, 19 U.S.C. §§1581 and 2072. *See Peo-*

ple v. *Serabie*, 51 Misc. 2d 914 N.Y.S. 2d 956 (Sup. Ct. 1966). The powers of FBI agents are expressed in 18 U.S.C. §3052. Those powers are stated in the same terms as those of United States Marshals and their deputies in 18 U.S.C. §3053. United States Marshals and their deputies are given the authority to exercise the same powers which a sheriff of a state may exercise in executing the laws thereof. 28 U.S.C. §570. Here it is not contested, and plaintiff asserts that the acts complained of were performed by the federal defendants in their official capacities (Appellant's brief 14). Thus, it is appropriate that the federal courts apply the statute of limitations in N.Y.C.P.L.R. §215(1) to the *Bivens* claims against federal defendants in this action.

In the alternative, since the gravamen of the claims against the federal appellees sounds in intentional tort, it is appropriate to apply the one year state of limitations in N.Y.C.P.L.R. § 215(3).[6] This is the section which was applied in *Felder* v. *Daley*, 403 F. Supp. 1324 (S.D.N.Y. 1975) in an action against federal agents under a *Bivens* rationale and against New York City policemen under 42 U.S.C. § 1983. The action was held to be barred against the federal agents although it was still viable against the city policemen. Similarly, in *Dailey* v. *Banks*, Civil Action No. A-74-42 (W.D.N.C., *decided* October 4, 1974, a copy of which decision is attached hereto as an addendum) the court found the *Bivens* claims against federal officers to be barred by the

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[6] N.Y.C.P.L.R. § 215(3) provides:

The following actions shall be commenced within one year:
3. An action to recover damages for assault, battery, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law (McKinney's 1972).

North Carolina one year statute of limitations for actions against a public officer for a trespass under color of his office although the statute was shorter than the state statute applicable to the § 1983 claims against local police officers.

Moreover, as the District Court noted, there is sound reason for New York's one year limitation period for common law claims arising from the acts of sheriffs in the performance of their duties (and, presumably, for the one year and ninety day period for common law claims arising from the acts of other police officers). The District Court expressed the reasons for the one year limitation period as follows:

> A claim arising out of an arrest situation—state or federal—is, as here, most often of the "confrontation" type and usually accompanied or followed by prompt appearances in a police station or before a court of magistrate. There appears to be no good policy reason for allowing a plaintiff claimed to be injured by such law enforcement action to have more than one year in which to discover whether his constitutional rights were violated. Law enforcement officers would be placed at a distinct disadvantage and effective action in making arrests would inevitably be inhibited if such officers had to wait for two, three or more years to find out whether or not they would be subject to some large civil liability at a time when memories were dim and witnesses and records perhaps not available. (App. 69-70).

Appellant seeks to avoid application of N.Y.C.P.L.R. § 215 by means of several arguments. First, appellant claims that to apply a statute of limitations applicable to acts done in an official capacity or by omission of an official duty violates the law of the case established by

the District Court's prior dismissal of the action as to the federal appellees in their official capacities. However, this assertion merely confuses suing an individual in his official capacity, which is a suit against the body under which he fills the capacity, and suing an individual in his individual capacity for acts performed by him in his official capacity. Thus, although an individual may not be sued in his official capacity he may be sued in his individual capacity for acts performed in his official capacity. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 237-38 (1974); *Sostre* v. *McGinnis*, 442 F. 2d 178, 205 (2d Cir. 1971).

Secondly, appellant claims application of N.Y.C.P.L.R. § 215 discriminates against him. Although federal courts will not apply a state statute which unfairly discriminates against a strong federal statute or policy, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942); *Caldwell* v. *Alabama Dry Dock and Shipbuilding Co.*, 16 F.2d 83 (5th Cir. 1947), the sort of discrimination which has been condemned does not exist in this case. The statute applied here is not one promulgated by a state to provide a special statute of limitations for specific federal statutory claims. *Cf. Republic Pictures Corp.* v. *Kappler*, 151 F.2d 543 (8th Cir. 1945); *Brown* v. *Blake & Bane, Inc.*, 409 F.Supp. 1246 (E.D.Va. 1976); *VanHorn* v. *Lukhard*, 392 F.Supp. 384 (E.D.Va. 1976). It is merely the application to a federal common law claim of a pre-existing state statute of limitation for the most analogous state law cause of action. The argument that the one year statute discriminates against appellant under the facts of this case because the basis of the federal appellees's probable cause for his arrest was not revealed to him is without merit. His arrest was the result of a confrontation situation and all the necessary facts for his commencement of an action were known to him in November, 1973.

Only the details of the federal apellees' defense were withheld because the investigation of the robbery for which he was arrested was continuing.

Thirdly, appellant claims the Court should fashion a federal tolling provision. *Lukenas* v. *Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976), relied on by appellant, discussed the requirement that the plaintiff show due diligence to discover the fraud and that the defendant be guilty of some affirmative act of fraudulent concealment. *See Holmberg* v. *Ambrecht, supra; Johnson* v. *Railway Express Agency, supra.* Such reasoning in the context of a fraudulent concealment case is inapposite to the present case.

Fourthly, appellant claims that the most applicable state statute of limitation is N.Y.C.P.L.R. §214(2) for "an action to recover upon a liability . . . created or imposed by statute." This disregards the distinction between the Constitution and a statute. As the Second Circuit stated in another context,

> [The United States] exists as a government of delegated powers by virtue of the constitution and while that is sometimes classed as among the laws of the United States in that it may be said to be the supreme law of the land it is not of a kind with specific laws passed in acocrdance with its provisions. *United States* v. *Cooper Corporation*, 114 F.2d 413, 414 (2d Cir. 1940).

It also ignores the essential distinction between a liability created or imposed by statute and a *Bivens* action for money damages which was created by the Supreme Court as a federal common law remedy as an exercise of federal judicial power. The liability imposed by *Bivens* is neither literally nor in concept created or imposed by statute.

Lastly, appellant claims that the most applicable state statute of limitation is N.Y.C.P.L.R. §213 (1) for actions for which no limitation is specifically prescribed by law. Within the schema of New York Statutes of Limitations this is simply not the statute applicable to the most similar state cause of action. Although a similar statute of limitations has occasionally been applied within the schema of other state statutes, the reasoning of those cases in inapplicable to the present case arising in New York State.

POINT III

The District Court Properly Dismissed Appellant's Claim Under Title 42 U.S.C. § 1985(3) For Lack Of A Racial Or Otherwise Class-Based Invidiously Discriminatory Animus.

In *Griffin* v. *Breckinridge*, 403 U.S. 88, 102 (1971), the Supreme Court held that in order for a complaint to state a claim under 42 U.S.C. § 1985(3) for conspiring to interfere with civil rights the complaint must state a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The lack of such an allegation in the complaint has been found to be fatal. *Arnold* v. *Tiffany*, 486 F.2d 216 (9th Cir. 1973); *Hughes* v. *Ranger Fuel Corp.*, 467 F.2d (4th Cir. 1972); *Droysen* v. *Hansen*, 59 F.R.D. 483 (D.C. Wis. 1973).

Paragraph "17" of appellant's amended complaint (App. 9) alleges a conspiracy in the following terms:

> All of the foregoing was done, was caused to be done, and is being done and is caused to be done by virtue of a conspiracy by said defendants without just cause, unlawfully, and unreasonably and contrary to law.

However, neither in paragraph "17" nor in any other paragraph of the complaint is there an allegation of the requisite racial, or perhaps otherwise class-based, invidiously discriminatory animus.

Although the Supreme Court in *Griffin* specifically did not decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . § 1985(3) . . . ." *Id.*, at 102 n. 9, subsequent decisions have examined the issue. In *Arnold* v. *Tiffany*, 359 F. Supp. 1034 (C.D. Cal), *aff'd*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974), a group of independent newsdealers sued officers of the *Los Angeles Times* alleging a conspiracy to prevent plaintiffs from forming and maintaining a newspaper dealers' trade association. In rejecting the newspaper dealers' assertion, the Court stated, "[F]or this Court to conclude that § 1985(3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law." *Id.* at 1036. Similarly, in *Bellamy* v. *Mason's Stores, Inc.*, 368 F. Supp. 1025 (N.D. Ill.), *aff'd*, 508 F.2d 504 (4th Cir. 1974) a member of the Ku Klux Klan who had been discharged because of his Klan affiliation asserted a claim under § 1985(3) and the Court found, "the class composed of members of the Ku Klux Klan is not, in the Court's opinion, possessed of discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex." *Id.* at 1028.

The cases relied on by appellant do not support his contention that he was or is a member of the type of class required by *Griffin*. In *Wakat* v. *Harlib*, 253 F.2d 59 (7th Cir. 1958), decided thirteen years prior to *Griffin*, the Court did opine that a person arrested because of a

record of conviction for crime was entitled to the protection of § 1985(3), but concluded, "[E]ven if plaintiff were not a member of a class against which defendants discriminated in a deprivation of federal civil rights, plaintiff, as a person, still has an action under § 1985." *Id.* at 65. The second case relied on by appellant, *Nugent* v. *Sheppard*, 318 F. Supp. 314 (N.D. Ind. 1970), also in the Seventh Circuit and also decided prior to *Griffin*, found that a complaint which asserted that the plaintiff had been beaten while at a town police station stated a cause of action under the "Civil Rights Act", but it did not consider the existence of class-based discrimination. Although the federal appellees do not dispute the proposition that an invidiously discriminatory sexual animus can be the basis for an action under § 1985(3), the third case relied upon by appellant, *Rackin* v. *Univ. of Pennsylvania*, 386 F. Supp. 992 (1974), did not examine that issue and found that sexual discrimination did not provide the basis for an action under 42 U.S.C. § 1981.

Thus, in light of *Griffin*, neither the amended complaint nor appellant's present assertion that he was discriminated against, because the defendants may have known of his prior arrest record or because he had "freedom to travel" in his job, present a colorable claim of the requisite "racial, or perhaps otherwise invidiously discriminatory animus behind the conspirators' action," to state a claim under 42 U.S.C. § 1985(3).

POINT IV

The District Court Properly Dismissed Appellant's Pendant Claim For Defamation Under New York State Law.

The appellant does not dispute that the one year statute of limitations under New York C.P.L.R. § 215(3) applies to the pendant claims under New York tort law. *See Constant* v. *Kulukundis*, 125 F. Supp. 305 (S.D.N.Y. 1954), nor does appellant dispute that all the alleged pendant tort claims, except for the claim for defamation, are barred. Appellant's claim for defamation arises from the publication of newspaper articles on November 17, 1973, reporting that he had been arrested and charged with robbery and from the subsequent showing of appellant's photograph to third persons. (Amended Complaint ¶¶ 13, 15 and 16, App. 8-9).

Appellant originally contended that these alleged acts were part of a continuing tort of defamation and, therefore, claims based upon acts occurring within one year of the commencement of this action were not barred, relying on *509 Sixth Avenue Corp.* v. *New York City Transit Authority*, 15 N.Y.2d 48, 255 N.Y.S. 2d 89 (1964) (continuing trespass to real property by an encroaching structure) and *Kearney* v. *Atlantic Cement Co.*, 33 A.D. 2d 848, 306 N.Y.S. 2d 45 (3d Dept. 1969) (continuing nuisance by a quarry and cement plant). However, these cases are not relevant to claims for successive acts of defamation which, under New York's "single publication rule," are barred unless brought within one year of the date when the allegedly defamatory material was first made public. *Zuck* v. *Interstate Publishing Corp.*, 317 F.2d 727 (2d Cir. 1963); *Gregiore* v. *C. P. Putnam's Sons*, 298 N.Y. 119 (1948). In the alternative, taking the news-

paper publications and the display of appellant's photograph as independent events, the claim based on the newspaper publications on November 17, 1973, is barred by the applicable New York statute of limitations.

Most significantly, the alleged acts which occurred within one year of the commencement of this action, the display of appellant's photograph to third persons, simply fail to state a claim for defamation under New York law. As the District Court stated, "Plaintiff's second contention, that a police officer's use of a photograph for identification purposes is of a defamatory nature is without merit." (App. 72). In boldly asserting that the display of appellant's photograph is defamatory on this appeal appellant not only does note cite any New York authority suggesting that it may be defamatory, but cites an A.L.R. annotation treating the use of a person's likeness for non advertising purposes as an invasion of privacy rather than as defamation. Annot., 30 A.L.R. 3d 203 (1976).

Although it is not directly contended that the display of appellant's photograph constitutes an invasion of privacy under New York law, the suggestion that it does may be inferred from his citation of authority. However, it is well established in New York that there is no common law cause of action for invasion of privacy and the only right of privacy is that which prohibits the use of a person's name, picture or portrait for advertising or trade purposes under New York Civ. Rights Law §§ 50 and 51. *Rand* v. *Hearst Corp.*, 26 N.Y. 2d 806, 309 N.Y.S. 3d 348 (1969); *Gautier* v. *Pro-Football, Inc.*, 304 N.Y. 354 (1952); *Assn' for Preservation of Freedom of Choice, Inc.* v. *Emergency Civil Liberties Committee*, 37 Misc. 2d 599, 236 N.Y.S. 2d 216 (1962).[7] Thus, the only

[7] Although appellant contends that, in any event, the display of his photograph is evidence of his constitutional claims, the claim that it is a violation of his civil rights is spurious in light of *Paul* v. *Davis*, 424 U.S. 693 (1976).

possibly viable pendant claim for defamation alleged by appellant is for acts occurring on November 17, 1973, which is barred by the applicable statute of limitations.

CONCLUSION

The order of the District Court dismissing appellant's complaint as to the federal appellees was correct and should be affirmed.

Respectfully submitted,

Dated: November 29, 1976
Brooklyn, New York

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
PROSPER K. PARKERTON,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

MEMORANDUM AND ORDER

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

Civil Action No. A—74—42

RUBEN J. DAILEY, Administrator of the Estate of Stanley W. Altland, et al.,

Plaintiffs,

—v.—

KERMIT BANKS, Sheriff of Yancey County, North Carolina, et al.,

Defendants.

The plaintiffs bring this Civil Rights action under the provisions of 42 U.S.C.A. 1983 and 1985, and invoke the court's jurisdiction under 28 U.S.C.A. 131 and 1343. They allege that the defendants have violated their civil and constitutional rights through a course of unlawful, unprovoked, wrongful and malicious conduct directed toward them as campers in a public camp ground in Yancey County, North Carolina. They seek injunctive and monetary relief. The plaintiff, Ruben J. Dailey, a North Carolina resident, is the duly appointed and acting Administrator of the estate of Stanley W. Altland, who at the time of his death was a Florida resident, and all of the other named plaintiffs are Florida residents. The defendants are all residents of North Carolina and were local, state and federal officers or employees at the time of the alleged incident. The defendant, Kermit Banks,

was the Sheriff of Yancey County, and Bill Arrowood, Erwin Higgins and Robert Banks were Deputy Sheriffs of Yancey County; Larry Dean Cox and Paul Wheeler were Deputy Sheriffs of Mitchell County; Horace Biggs was a Police Officer of the Town of Burnsville; Harold Rivers, Blaine Ray, Johnny McLain and Jack Olinger were employees of the United States Forest Service, and Terry Shankle was an employee of the North Carolina Wildlife Commission.

The defendants, Kermit Banks, Bill Arrowood, Robert Banks, Erwin Higgins, Larry Dean Cox, Paul Wheeler and Horace Biggs, have answered and moved to dismiss pursuant to Rule 12(b)(6) and for judgment on the pleadings or for summary judgment as a matter of law on the grounds that there is no genuine issue as to any material fact, and that the court lacks jurisdiction since there is no diversity of citizenship between the plaintiff, Ruben J. Dailey, and the defendants and that the action is barred by the statute of limitations.

The defendants, Ray, McLain, Rivers and Olinger, the four federal Forest Service employees, have moved to dismiss under Rule 12(b)(6), and for judgment on the pleadings on the grounds that the Complaint fails to state a claim upon which relief can be granted, and that the action is barred by the statute of limitations. In support of their Motions they have filed affidavits and a legal memorandum.

The defendant Shankle moved to dismiss pursuant to Rule 12(b)(6) and for judgment on the pleadings on the grounds that the Complaint fails to state a claim against him for which relief can be granted, and that the action is barred by the statute of limitations. He has filed an affidavit in support of his Motions.

Memorandum and Order

The Motions were heard at the August 1974 term in Asheville, and after full consideration of the pleadings, the affidavits, documents and briefs, the Court now enters its findings and conclusions.

The plaintiffs allege that on July 3, 1972, while they and plaintiff's intestate were camped near the Black Mountain Camp Ground in Yancey County, the defendants Ray and Shankle, following the directions of the defendant McLain, approached them and directed that they leave the area. They contend they obeyed these instructions and moved to the "Brief Bottom" Camp Ground and that about 10:30 P.M., the defendants, Kermit Banks, Robert Banks, Erwin Higgins, Bill Arrowood, Horace Biggs, Larry Cox, Paul Wheeler, Harold Rivers and Jack Olinger "began a series of unwarranted, unlawful, unprovoked and vicious assaults" upon them by using threatening language, shoving and kicking the plaintiffs, striking them with weapons and conducting illegal and unconstitutional searches of their persons. They further allege that in the course of these assaults a shotgun load was discharged into the body of the deceased Stanley W. Altland, which caused his death. They contend that they had no weapons, were not violating the law and were falsely arrested and taken to the Burnsville Police Station where they were kept until their release on the morning of July 4, 1972. The plaintiffs contend that the defendants were "acting individually, jointly and severally, separately and conspiratorily under color of statute, regulation, custom and usage of the State of North Carolina." They allege that these "concerted acts and omissions were further intended to and did deprive plaintiffs and plaintiff's intestate of those rights secured to them under the Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

Memorandum and Order

All of the defendants have alleged the affirmative defense of the statute of limitations as a bar to the maintenance of this action. The local and state officers and employees contend that an action under 42 U.S.C.A. 1983 is controlled by the statute of limitaions of the State wherein the cause of action arose. They contend that N.C. G.S. 1-54(1) which provides that within one year an action must be commenced "against a public officer, for a trespass under color of his office" is applicable here and that the plaintiffs' action is barred by this statute. The record shows that the incident occurred on July 3, 1972, and that this action was filed in this court on May 6, 1974.

The four defendants who are federal employees say and contend that they are not subject to 1983 actions which pertains to actions under color of state law, and that if the plaintiffs have a cause of action against them it would be under constitutional provisions as declared by the Supreme Court in *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999. However, they say that N.C. G.S. 1-54(1), the one year statute, is applicable and would bar all actions of the plaintiffs except the one for wrongful death which falls under N.C. G.S. 1-53(4) (2 years).

The plaintiffs admit that since no "federal proscription period" is given for actions brought under 1983 and 1985 federal courts have consistently applied state statutes of limitations. However, they contend that the applicable statute here would be N.C. G.S. 1-52(2) which provides that an action must be brought within three years upon a liability created by statute unless some other time is mentioned in the statute creating it, and that this statute would apply to all of the actions except the one for wrongful death.

Memorandum and Order

Congress has not enacted a statute of limitations which is applicable to 1983 and 1985 actions. In such circumstances, federal courts follow the limitations period fixed by the law of the state in which the district court is held. *Almond* v. *Kent*, 459 F.2d 200 (4th Cir. 1972). The question then arises as to which state statute applies here.

It appears that these causes of action arise from two different sources. 1983 and 1985 create causes of action and confer federal jurisdiction over state and local law enforcement officers acting under color of state law. Therefore, since the alleged causes of action against the local and state officers arise by way of statute it follows that N.C. G.S. 1-52(2), the three year statute of limitations, would apply. Thus, the actions of the plaintiffs, including the wrongful death action against the state and local officers would not be barred by the statute of limitations.

Since 1983 and 1985 do not creaete a cause of action against the federal officers or employees in this action it follows that the alleged cause of action stated by the plaintiffs would be derived directly from the Constitution. *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narcotics, supra; States Marine Lines, Inc.* v. *Shultz, and others*, No. 73-2065 (4th Cir. June 14, 1974). It therefore follows that since the cause of action is not derived from a statute the controlling statute of limitations would be N.C. G.S. 1-54(1), the one year statute. Since the acts complained of occurred on July 3, 1972 and this action was instituted on May 6, 1974, this statute would bar all actions except the one for wrongful death against the four federal employees. The action for wrongful death is governed by N.C. G.S. 28-173, the wrongful death statute, and N.C. G.S. 1-53(4), the two year statute of limitations.

Memorandum and Order

The defendants who are local law enforcement officers, move to dismiss the action against them under Rule 12 (b) (6) for failure to state a claim upon which relief can be granted, and for lack of jurisdiction in the wrongful death action since Ruben J. Dailey, Administrator, is a North Carolina citizen, and there is no diversity of citizenship. In the alternative, these defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. They have offered no affidavits or other documents in support of the motion for Summary Judgment.

The plaintiffs do not rely upon diversity jurisdiction, but if they had, the fact that Ruben J. Dailey, the Administrator, is a North Carolina citizen would not defeat jurisdiction. He is the Administrator of the estate of Stanley W. Altland who was a Florida citizen at the time of his death, and there is nothing in the record to indicate that the beneficiaries of his estate are North Carolina citizens. For the purpose of determining diversity jurisdiction the citizenship of the deceased's beneficiaries and not that of the Administrator is controlling. *Miller* v. *Perry*, 456 F.2d 63 (4th Cir. 1972). A careful reading of the Complaint reveals without question that a cause of action is stated against these local law enforcement officers, and thier Motion to Dismiss will be denied.

The defendant Shankle, a State Wildlife Commission employee, has also moved to dismiss under Rule 12(b) (6), or in the alternative for judgment on the pleadings. He has filed an affidavit in support of such motion and the Court will consider his motion as one for summary judgment pursuant to Rule 56 and determine if there is a genuine issue as to any material fact.

Memorandum and Order

The defendant Shankle sets forth in his affidavit, which is not refuted by the plaintiffs, that on July 3, 1972, he was about his duties as an employee of the North Carolina Wildlife Commission and was travelling near the Black Mountain Camp Ground when he observed motor vehicles parked in a "No Camping" area located on United States government property under the control of the United States Forest Service. Since he had no authority to advise the occupants who were camping in the area to leave, he proceeded to report the incident to the defendant, Blaine Ray, a United States Forest Service employee. Thereafter, the defendant Shankle states that he went to his residence and reported the incident by telephone to the defendant Rivers at the Burnsville office of the United States Forest Service. Thereafter, he resumed his patrolling duties and met the defendant Ray and the two of them went to the camp site where Mr. Ray advised the persons camping there that the area was closed and it would be necessary for them to move; that he at no time told the campers to move and that he spent his time there drawing a map showing the campers how to get to a proper camp ground on Curtis Creek. He states that Mr. Ray gave the campers two hours to clear the area and move, and that he and Ray then left. At the time of this visit to the camp ground Shankle was dressed in his uniform of Wildlife Protector for North Carolina, and defendant Ray was in a Forest Service uniform. He states that he returned to the camp site one hour later and that the campers appeared ready to leave and that on his next trip to the area at about 3:00 P.M., the campers were gone. He testified that he did not see the campers again and that he continued to patrol the area until ten P.M. when he returned to his home and went to bed. He testified that he was not present when any

of the plaintiffs were allegedly assaulted, searched or arrested nor when they were taken to Burnsville on July 4, 1972.

Since plaintiffs have filed no opposing affidavits, the Court concludes that there is no genuine issue as to any material fact relative to the defendant Shankle, and that he is entitled to a judgment of dismissal as a matter of law. His Motion for Summary Judgment will, therefore, be allowed.

The four federal defendants have moved to dismiss the wrongful death action for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b) (6), or in the alternative for judgment on the pleadings. In support of their motion they have offered affidavits, and the Court will therefore consider such motion as a Motion for Summary Judgment pursuant to Rule 56.

The defendant Ray sets forth in his affidavit that he has no personal knowledge of any of the events complained of in the Complaint which occurred on the evening of July 3rd and the early morning hours of July 4, 1972. He states that he learned of the shooting incident and the arrest at about 3:00 P.M. on July 4, 1972, a long time after the occurrence. He states that on the morning of July 3, 1972, at approximately 9:30, he met the defendant Shankle, the Wildlife Commission employee, who told him that a group of young people were camping in a "No Camping" area below Black Mountain Camp Ground. He further states that the defendant McLain instructed him by radio to go to the area and advise the group to move to a proper camping area. He states that he asked the defendant Shankle to accompany him and that they both

went to the area where they found some nineteen young people camping in a "No Camping" area. The group had a fire going and he noticed the post of a "No Camping" sign burning in the fire. He states that he advised the group that it would be necessary for them to move and that he and the defendant Shankle told them of a camp ground on Curtis Creek and drew a map showing directions to such area. He testified that the group seemed to be satisfied with the suggestion and stated they would leave. He testified that at no time did he in any way deprive the plaintiffs of their constitutional rights or assault or abuse them in any way, that he could have given them a citation for violation of park regulaitons but he chose instead to request them to move to a proper area. He testifies that he was courteous to the plaintiffs at all times and was not a part of any alleged plan or conspiracy to harm them and knows nothing about the events which occurred later that day and night.

The defendant Olinger set forth in his affidavit that on the morning of July 3, 1972, at about 7:45, while traveling from the Black Mountain Camp Ground to the District Office in Burnsville, he observed seven cars and a large group of campers in a "No Camping" area and that the "No Camping" sign had been removed. He states that he did not confront the group at that time but instead drove to the Ranger Station where he reported the incident to the defendants, McLain and Rivers. He testified that he passed the area again about 11:00 A.M. and found that the group had gone and he heard nothing more about these campers until 9 or 10 P.M. on July 3, 1972. He testified that this time the defendant Rivers told him that a gang of persons were camped at the Briar Bottom Overflow Camp site and that they

were causing a disturbance and shooting fireworks, and that the defendant Rivers told him to call the Yancey County Sheriff's office. The defendant Olinger further states that at about 11:30 P.M. the Sheriff and his Deputies arrived and asked him and Rivers to use their pick-up trucks to transport some men across the river. He states that he drove some Deputies to the camp site, parked, let them out, and parked his truck about 100 feet beyond the camp site. He saw a light-colored van truck nearby and went over to it. He was accompanied by the defendant Rivers and two Deputies and as they approached they asked the people in the van to come out. Two men who appeared to be under the influence of intoxicants staggered out and a third man had to be helped from the van. The Deputies thereupon searched the men and took them over to the camp site, but that the affiant was instructed to remain with the van. In about ten minutes he heard what sounded like a shot and that about two minutes later the defendant Rivers told him that someone had been shot and that he was going to take the wounded man to the hospital. He states that he never went to the camp site and did not see what occurred there since he was about 150 yards from it. He states that he did not assault anyone and did not deprive anyone of their rights nor did he conspire or plot with anyone else to deprive the plaintiffs of their rights.

The defendant McLain testified that his only dealings with the plaintiffs in this lawsuit occurred on July 3, 1972, at about 9 or 9:30 A.M. when he received reports that a group of young people were in a "No Camping" area near Black Mountain Camp Ground. He states that pursuant to these reports he sent the defendant Ray to the area to check on the group and request their compliance with park regulations. He states that at about

10 A.M. Ray reported to him that the group was leaving the area and that at about 11 A.M. on the same day he left town and did not return until about 2 A.M. on July 4, 1972. He states that at 5 A.M. the defendant Rivers called and reported to him that a young man had been accidentally shot and killed; that he did not participate in the alleged assaults or in any conspiracy or plot to assault or injure any of the plaintiffs and that he has no personal knowledge of what occurred at any of the camp grounds during the time of these alleged incidents.

The defendant Rivers states that about 9 P.M. on July 3, 1972, he drove to the Briar Bottom Overflow Area and there heard loud music and shooting which appeared to be fireworks. He saw about twenty-seven young people, some of whom he thought had been drinking. That he left the area immediately and went to his home and called the Yancey County Sheriff's office to report the disturbance since at that time Forest Service personnel were not allowed to carry guns, and he felt this was a matter for law enforcement officers. He testified that he returned to the camp ground, talked with other campers about the group in question, returned home and called the Sheriff's office the second time. He states that thereafter he and the defendant Olinger used their personal pick-up trucks to take the officers across the river to the camp site and that he and Olinger, accompanied two officers to a van truck located approximately 150 yards from the camp site where the officers or Deputies placed three men, not the plaintiffs, under arrest. He testified that he then walked with the Deputies to his truck and was standing there talking with them when he heard what sounded like a shotgun blast. He then rushed to the spot from which the sound of the

shot had come and saw a man lying on the ground and another man giving him resuscitation; that the man stopped and stated that the wounded man was dead. He testified that he was stunned and frightened and that his first thoughts were to get the man to the hospital which was some 20 miles away and that the quickest way to do so was to use his pick-up truck rather than to call an ambulance; that he and the two Deputies lifted the man into the back of his pick-up truck and that he wrapped him in a blanket and drove him to the hospital in Burnsville. At the hospital a nurse pronounced the man dead and advised that he should be taken to the mortuary. He testified that he did not commit any assaults upon any of the plaintiffs and that he had no part in any effort to violate the plaintiff's constitutional rights.

The Administrator has filed no affidavits in opposition to the affidavits filed by the federal defendants and has made no effort to refute their statements. The Complaint alleges no facts to establish any conspiracy, connection, or wrongdoing on the part of the defendants Rivers, Ray, McLain and Olinger against the deceased. On the contrary, the Complaint specifically alleges that Sheriff Banks shot and killed plaintiff's intestate. During oral argument the Court inquired of plaintiffs' counsel as to what evidence had been uncovered during his investigation and the criminal trials in State Court as to the federal employees' participation in the incident. He advised that he was relying upon his allegation of a conspiracy and hoped to develop some evidence during discovery. There was some indication that additional affidavits would be filed but none have been submitted. It therefore appears that there is no genuine issue of material fact and that the federal defendants' Motion for Summary Judgment should be allowed in the wrongful death action.

Memorandum and Order

IT IS, THEREFORE, ORDERED as follows:

1. That the Motion to Dismiss and/or for Summary Judgment filed by the defendant, Terry Shankle, be, and the same is hereby allowed, and the action is dismissed as to him.

2. That the Motions to Dismiss and for Summary Judgment of the federal defendants, Ray, McLain, Rivers and Olinger, be, and the same are hereby allowed, and the action is dismissed as to them.

3. That the Motions to Dismiss, or for judgment on the pleadings or Summary Judgment filed by the defendants, Kermit Banks, Bill Arrowood, Erwin Higgins, Robert Banks, Larry Dean Cox, Paul Wheeler and Horace Biggs, be, and the same are hereby denied.

This the 3rd day of October, 1974.

/s/ WOODROW W. JONES
Chief Judge, United States District Court

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(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

PROSPER PARKERTON, being duly sworn, says that on the 2nd day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF/FOR THE APPELLEE AND ADDENDUM of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hon. W. Bernard Richland
Corporation Counsel of the
City of New York
Municipal Building
New York, New York 10007

GUGGENHEIMER & UNTERMEYER, ESQS.
80 Pine Street
New York, New York 10005

Sworn to before me this
2nd day of December, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618278
Qualified in Queens County
Term Expires March 30, 1977

Prosper K. Parkerton

PROSPER PARKERTON